

From: [Benbow, Gene](#)
To: [Gene Benbow](#)
Subject: FW: Reckitt news
Date: Wednesday, May 22, 2013 1:58:00 PM

Gene Benbow
Biologist
Insecticides-Rodenticides Branch
<http://epa.gov/pesticides/>

From: Laws, Meredith
Sent: Wednesday, May 22, 2013 1:48 PM
To: Hebert, John; Jacobs, William; Gaines, Jennifer; Benbow, Gene
Subject: Reckitt news

Daily News

Novel FIFRA Challenge Targets EPA Bid To Block Existing Stock Sales

Posted: May 22, 2013

The novel industry challenge to EPA's efforts to ban the use of some d-Con rodenticides, one of the first such efforts under federal pesticide law, is targeting the agency's determination that its ban of the products extends to the sale of existing stocks, according to recently filed administrative and judicial briefs.

In the briefs, filed earlier this month, manufacturers, a retailer and users of the rodenticides indicated they are fighting EPA's determination that its ban of the products extends to existing stocks, with the manufacturer arguing the decision should be subject to judicial review, and the retailer and users saying EPA is punishing the manufacturer for contesting the proposed ban.

Fears that EPA's ban, now under review by an agency administrative law judge, would require retailers and users to destroy their Reckitt Benckiser LLC d-Con rodenticides at a significant financial loss has prompted the retailer and users to back the company's push for EPA's administrative court to take up the existing stocks question.

The same concern prompted Reckitt last month to petition the U.S. Court of Appeals for the 10th Circuit, even while the administrative review is ongoing, to ensure a future appeal of the existing stocks decision is not time-barred.

EPA included the prohibition against the sale of existing stocks in its Feb. 5 notice of intent to cancel (NOIC) 12 registrations for Reckitt's d-Con brand rodenticides. The agency contends that its decision on existing stocks of the products is outside the scope of the administrative law judge's review.

EPA's intended ban on certain Reckitt products follows the manufacturer's refusal to follow the agency's 2008 risk management decision, which allows the anticoagulant rodenticides to be applied by professional exterminators, but restricts their use in products that consumers can purchase. In particular, EPA prohibited sale of four so-called second-generation anticoagulant chemicals and required companies that produced consumer rodenticides as loose pellets to package them in "bait stations" in order to reduce children's and pets' exposure to the rodenticides.

That the dispute has progressed to an administrative hearing is unusual because most manufacturers reach voluntary agreements with EPA about changes to their Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) registrations in order to preserve their products' market access. Observers say the review process is

resource intensive and could distract agency staff from other issues.

EPA officials have said the cancellations of 12 registrations for Reckitt rodenticide products and two registration applications are necessary to prevent "completely avoidable risks to children." The ban, which is pending review under section 6 of FIFRA, is one of less than a handful of times the agency has attempted a product cancellation in more than two decades.

In a May 13 filing, the retailer Do It Best Corp. and two users of Reckitt rodenticides support an earlier call from Reckitt for the administrative law judge to review EPA's existing stocks determination, arguing that the products are effective and that companies which have settled with EPA have been allowed to sell their existing stocks either without restriction or for specified periods of time.

If the question is not addressed by the administrative court, the users and retailer say they would file a lawsuit in federal court. The users are the Greater Cincinnati Northern Kentucky Apartment Association and the Louisville Apartment Association.

Stocks Determination

Meanwhile, in [a May 6 brief](#) Reckitt asks the 10th Circuit to either find that EPA's existing stocks determination is not yet final because it was merely issued in the NOIC and the cancellation is still under review by the administrative law judge, or to grant a stay and postpone consideration of the issue.

[In its brief to the 10th Circuit](#), Reckitt challenges EPA's assertions that existing stocks may not be sold, as well as the agency's claim that the decision may not be challenged in the administrative court. Reckitt says EPA's existing stocks determination is not final, in part because Reckitt and others have objected to it, and also because the decision was not subject to public comment. For these reasons, Reckitt argues the decision should be subject to review by the appeals court.

Reckitt petitioned the 10th Circuit while the administrative hearing is ongoing as a precautionary measure to ensure that if the administrative law judge or another court decides that EPA's existing stocks determination included in the Feb. 5 NOIC was a final order, future review of that determination would not be time-barred. Reckitt also says case law related to FIFRA is unclear.

In their May 13 filing with the EPA administrative court backing Reckitt's push for review of the agency's existing stocks determination, Do It Best Corp. and the two users say Reckitt products are the most popular and best-known consumer rodenticides, and that the existing stocks determination is relevant to the overall cancellation effort. Continued sale of the existing stocks would speak to the efficacy of those products and also to the unavailability of alternatives, the retailer and users say.

The groups allege that EPA barred the sale of existing stocks in its NOIC as an effort to intimidate the company's retailers and customers, and to punish Reckitt for seeking the rare and time-consuming hearing rather than settling with the agency, a move that has yielded other manufacturers a more favorable dispensation of their existing stocks.

The group also says EPA's contention that its existing stocks determination is final and not subject to review by the administrative court is wrong, and that the administrative law judge rather than the agency has the right to determine the scope of the review.

Several environmental groups have sought to intervene in EPA's administrative hearing, arguing that other manufacturers have complied with the recent EPA decision but that Reckitt is stalling and continuing to profit off poisons that "pose a significant risk to bobcats, foxes, owls and other animals that are apt to eat poisoned rats or mice," according to their statement.